

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
Roanoke Division

ROBERT J. COLLIER,	)	
Plaintiff,	)	
	)	
v.	)	
	)	
LAND & SEA RESTAURANT CO.,	)	Case No.: 7:13-cv-104
LLC d/b/a FRANKIE ROWLAND'S	)	
STEAKHOUSE	)	
Defendant/Third Party Plaintiff,	)	
	)	
v.	)	
	)	
PERFORMANCE FOOD GROUP, INC.	)	
d/b/a PERFORMANCE FOOD SERVICE –	)	
VIRGINIA,	)	
Third Party Defendant/	)	
Fourth Party Plaintiff,	)	
	)	
v.	)	
	)	
SAM RUST SEAFOOD, INC.	)	
Fourth Party Defendant/	)	
Fifth Party Plaintiff,	)	
	)	
v.	)	
	)	
CAPE COD SHELLFISH & SEAFOOD CO.,	)	
Fifth Party Defendant/Sixth Party Plaintiff,	)	
	)	
v.	)	
	)	
NORM BLOOM AND SON, LLC,	)	
Sixth-Party Defendant.	)	

**RESPONSE OF FOURTH PARTY DEFENDANT/FIFTH PARTY PLAINTIFF SAM RUST  
SEAFOOD, INC. TO SEPTEMBER 9, 2014 NOTICE**

COMES NOW Fourth Party Defendant/Fifth Party Plaintiff Sam Rust Seafood, Inc.  
("Sam Rust"), by counsel, and for its response to the Court's September 9, 2014, Notice (ECF

No. 195 at 1-2), providing the parties with an opportunity to offer arguments or comments as to the effect of Sam Rust's pending appeal on the court's exercise of jurisdiction, states the following:

As a preliminary matter, Sam Rust states that Land & Sea Restaurant Co., LLC's ("Land & Sea") assertion—both in its Motion to Dismiss filed in the Fourth Circuit and in its Response to this Court (ECF No. 196 at \*) that "Sam Rust rejected Land & Sea's invitation" to withdraw its appeal is inaccurate. Land & Sea's letter was sent to counsel for Sam Rust on August 3, 2014. The letter gave Sam Rust until August 5, 2014—two (2) business days later—to withdraw its Fourth Circuit appeal during which time record counsel were involved in a deposition in the instant case. Counsel for Sam Rust conversed with lead counsel for Land & Sea at said deposition which occurred on Friday, August 5, 2014, the second of the two days stated in Land & Sea's "invitation" letter. During this conversation, counsel for Sam Rust acknowledged receipt of the letter and requested additional time in which to consult with his client and other necessary parties. Counsel for Land & Sea did not refuse counsel for Sam Rust's request for additional time in which to consider Land & Sea's demand, and, in fact, counsel appeared to acquiesce to the request. The Motion to Dismiss the appeal filed by associate counsel for Land & Sea on Monday, August 8, 2014, in the Fourth Circuit before counsel for Sam Rust was able to discuss the issue with his client, with independent counsel for his client, and with the liability adjuster assigned to this matter, came as a surprise to counsel for Sam Rust, who believed he had been granted additional time by lead counsel for Land & Sea to fully and properly address the issues raised in counsel's "invitation" letter. Thus, Sam Rust takes exception to Land & Sea's representations to both this Court and to the Fourth Circuit concerning both Sam Rust's lack of

good faith in connection with the appeal, as well as with its alleged “rejection” of the demands of Land & Sea’s counsel.

Moreover, it was impossible for counsel for Sam Rust to provide an answer the Land & Sea in such a short time, as there is a separate coverage litigation now pending in the Circuit Court of the County of Henrico styled *Performance Food Group, Inc. v. Penn National Security Insurance Company, et al.*, Case No.: CL 14-1618, which litigation has a direct impact on the demands of Land & Sea. Sam Rust had previously brought this coverage action to the attention of this Court in its Memorandum of Fourth Party Defendant/Fifth Party Plaintiff Sam Rust Seafood, Inc. in Opposition to Motion of Third Party Defendant/Fourth Party Plaintiff Performance Food Group, Inc. for Summary Judgment, ECF No. 186 Filed 08/29/14 Page 14 of 17 Pageid#: 2232. In the Henrico County litigation, Sam Rust is represented by its own corporate counsel. The coverage litigation in Henrico involves different attorneys for some of the parties and liability insurance carriers in their own capacity as parties. The coverage litigation may affect the pending demands by both Land & Sea and Performance for defense and indemnity under the agreement between Performance and Sam Rust. While the undersigned has not been retained as coverage counsel in this matter, and that issue is separate and apart from the defense of Sam Rust in the current litigation, both the July 21, 2014, Order of this Court and Land & Sea’s “invitation” letter which was sent to Sam Rust in the wake of this Court’s July 21, 2014, Order relate to the issues of indemnification, defense, and coverage.

Sam Rust’s appeal from the district court’s July 21, 2014, Order provided, among other things, a unique opportunity for mediation, which currently is pending in the Fourth Circuit. Various parties have stated their intention to raise issues in controversy in this case in the mediation, including issues relating to notice and coverage, the resolution of which issues would

tend to facilitate resolution of multiple issues currently in controversy between the parties in the instant case. In fact, at the request of counsel for Plaintiff Collier, and based on the unavailability of counsel for other parties, the mediation, which had been scheduled for the date of this filing, has been continued to another date so that all counsel relevant to the issues in controversy may participate.

Section 1292(b) of 28 U.S.C. provides that, “[A]pplication for an appeal [pursuant to this section] shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.” As the United States Court of Appeals for the Fourth Circuit has not ordered a stay of the proceedings in the district court, and the other parties wish to have the district court proceedings continue, it is Sam Rust’s position that this case should proceed notwithstanding the appeal.

SAM RUST SEAFOOD, INC.

By: /s/ C. Jay Robbins, IV  
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**CERTIFICATE**

I hereby certify that on September 15, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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I further certify that on September 15, 2014, courtesy copies of the foregoing were sent first-class mail, postage prepaid to the following:

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